No. 95-789



In The

# Supreme Court of the United States

October Term, 1995

CALIFORNIA DIVISION OF LABOR STANDARDS ENFORCEMENT, et al.,

*Petitioners,*

v.

DILLINGHAM CONSTRUCTION, N.A., and MANUAL J. ARCEO, dba SOUND SYSTEMS MEDIA,

*Respondents.*

**Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF OF AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ROBERT E. JESINGER #59550
WYLIE, MCBRIDE, JESINGER, SURE & PLATTEN
101 Park Center Plaza, Suite 900
San Jose, CA 95113
(408) 297-9172

*Counsel for Amici Curiae California Association of the Sheet Metal and Air Conditioning Contractors National Association, Sheet Metal and Air Conditioning Contractors National Association, Associated Plumbing & Mechanical Contractors, Sacramento Chapter of the National Electrical Contractors Association, Mechanical Contractors Association, Northern California Drywall Contractors Association, Associated Roofing Contractors, Plumbing Piping Industry Council, and Plumbing, Heating, Cooling Contractors of California*

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## CONSENT FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*

Petitioners and Respondent, through their counsel, have consented to the filing of this Brief *Amici Curiae*. The original form indicating the consent of all parties was submitted to the Clerk of this Court with the filing of this Brief *Amici Curiae*.

## INTEREST OF *AMICI CURIAE*

All of the *Amici* are contractor associations whose members have participated in apprenticeship training programs and made substantial contributions to those programs in the State of California, and in some cases throughout the United States. Their member employers have in the past employed apprentices on California State and on Federal public works projects, utilizing the apprentice wage specific rate for these apprentices who are duly registered in programs approved by the State of California as meeting Federal standards.

California SMACNA (Association of Sheet Metal and Air Conditioning Contractors National Association) represents 440 contractors who perform work on commercial and residential air conditioning and heating, architectural sheet metal, industrial sheet metal, kitchen equipment, metal roofing, sheet metal fabrication, and manufacturing, testing and balancing of heat and air, siding and decking. They perform work throughout the western United States and employ and train 971 apprentices in the State of California.

The Sheet Metal and Air Conditioning Contractors' National Association, Inc. has approximately 1900 contractor members engaged in the sheet metal and air conditioning building and construction industry throughout the United States. Organized contractors in the sheet metal industry train and employ about 90,000 apprentices nationwide and pay approximately $175,000,000.00 into local, regional and national training funds on an annual basis.

The Northern California Drywall Contractors Association represents 60 contractors working in the drywall insulation and taping industry in the 46 northern California counties. The Associated Roofing Contractors represent 20 large roofing contractors who perform work throughout the same 46 northern California counties. Their members train and employ about 600 apprentices.

The National Electrical Contractors Association, Sacramento Chapter, represents 60 electrical contractors active in industrial, commercial and residential electrical work throughout northern California and northern Nevada. These contractors train and employ over 160 apprentices.

The Plumbing & Piping Industry Council, Inc. represents 400 plumbing and piping contractors engaged in this business in the States of California, Arizona, Washington, Oregon, Utah, Colorado, Nevada, Idaho, and Hawaii. They train and employ some 1,000 apprentices.

The Associated Mechanical & Plumbing Contractors represent 50 contractors who perform plumbing and piping work in commercial, industrial and residential construction. This work takes place mostly in six northern



California counties. Together, these contractors train and employ approximately 100 registered apprentices.

The Mechanical Contractors Association represents 150 contractors who perform plumbing, piping, heating, air conditioning, and refrigeration work in industrial, commercial and residential construction. This work is performed in northern California and in Nevada. They train and employ approximately 650 registered apprentices.

The Plumbing, Heating, Cooling Contractors of California operates a California State approved unorganized apprenticeship program. It represents 400 contractor members who are engaged in high technology and public works jobs throughout California involving industrial, commercial and residential projects. Their program trains and their members employ approximately 600 apprentices.

The *Amici Curiae* support the Petition for *Writ of Certiorari* in *Dillingham v. State of California*, as reported at 57 F.3d 712 (9th Cir. 1995), and seek reversal of the opinion of the United States Court of Appeals for the Ninth Circuit.

## SUMMARY OF ARGUMENT

The conflict between the Ninth [*Dillingham*] and Eighth [*Minnesota Chapter ABC v. Minnesota*, 47 F.3d 975 (8th Cir. 1995)] U.S. Circuit Courts of Appeals decisions

means that the *Amici* Contractors face economic uncertainty and conflicting directives regarding the use of state registered apprentices on public works projects.

An apprentice specific wage rate (lower than that required to be paid to journey level workers on prevailing wage jobs) is essential for the *Amici* contractors to be able to use apprentices economically on public works projects. Apprentices are not as productive as journey level workers. Quality apprenticeship training is expensive. Yet, the effect of the Ninth Circuit opinion creates an economic disincentive for contractors to enter into apprenticeship agreements that meet the Federal standards for training. Before *Dillingham*, in order to pay the lower apprentice rate, a contractor had to objectively demonstrate that it was actually funding apprentice training to a minimum level. Now, unscrupulous contractors can withhold funding, yet still benefit by the lower wage scale. The *Amici* Contractors cannot ignore the economic realities of this inequity.

Contractors are also, as a result of the Ninth Circuit's opinion, subject to conflicting State regulation in that they must employ apprentices enrolled with State approved programs on Federal jobs in order to get the lower rate but need not employ such apprentices on State public works jobs. If contractors, because of this competitive disadvantage, pull out of approved apprenticeship programs (resulting in the cancellation of the financial commitment that those programs require), the programs will surely collapse. Apprenticeship training will become meaningless other than as a means of obtaining the lower wage rate allowed for utilizing apprentices by merely



representing that "apprentices" are being utilized on public works projects.

## ARGUMENT

Contractors who voluntarily assume training responsibilities under apprenticeship agreements which meet Federal standards incur costs greater than their competitors who do not agree to meet such training standards. This is a cost which these contractors may not be able to afford with respect to public sector projects because of the competitive bidding statutes. These statutes generally require that the public agency award the bid to the "lowest responsible bidder." Following *Dillingham*, an unscrupulous contractor will be able to classify all of its workers at the lower apprentice specific wage rate, without having to meet the Federal standards for apprenticeship training, and thereby obtain a decisive bidding advantage over contractors who have assumed full financial and legal responsibility for meeting the higher and more costly training standards for State approved apprenticeship programs.

Thus, ethical contractors who do not wish to turn prevailing wage laws into the sham now permitted by *Dillingham* will lose public works bids to those contractors who are willing to style all of their workers as "apprentices" and pay them the lowest wages. They can pay the lowest wage after *Dillingham* without committing any resources to actually pay for apprentice off-the-job training. These unethical competitors will have an unfair economic advantage in the bid process by using "paper

only" apprentices, i.e., lower paid because they are called apprentices, not because they are being properly trained.

When competing employers submit bids for works governed by State prevailing wage laws, their estimates as to labor costs might be based on the assumption that all workers must be paid a journey level wage, or that all workers could be paid an apprentice level wage, or any variant in between those two extremes. However, the uncertainty as to what constitutes compliance with State prevailing wage law created by *Dillingham* inevitably produces a downward pressure on prevailing wages for State public works. This will occur because at the very least *some* contractors submitting bids will assume that a large segment of their work force could permissibly be classified as apprentices and thus be paid the lower wage rate. Competing bidders will have to likewise adjust their assumptions about permissible wage rates in order to have any hope of becoming the lowest bidder. Creation of such a downward pressure on prevailing wages through an entirely contrived devaluation of appropriate compensation rather than as a result of market forces is directly contrary to the legislative intent of the prevailing wage statutes – to insure that when the government engages in construction projects, in order to provide fair compensation for the employees working on those projects, the prevailing wage in the area is to be paid for the labor – not just the lowest possible price.

In essence, by stripping California's power to declare which employees can legitimately be paid a lower rate on public construction works, *Dillingham* invites an unseemly charade by competing contractors, a charade that is beyond scrutiny because of Federal preemption.



Workers who have years and years of experience in a trade can one day be issued the emperor's proverbial set of new clothes and become *instant apprentices* [for pay purposes]. Under *Dillingham*, the State is left with no authority to question such a charade, for questioning the legitimacy of their new apprentice status becomes the legal equivalent of saying the magic word, the duck comes down, and ERISA's preemptive effect trumps all. The result is that the prevailing wage statute is neatly and completely circumvented, allowing mischievous contractors to vastly underpay their work forces on public construction projects to the competitive detriment of responsible contractors who attempt to comply with the letter and the spirit of such employee-protective statutes. The net effect of *Dillingham*'s application of ERISA preemption principles is that, through the rubric of preempting State regulation of apprenticeship, State regulation of employee wages is also preempted, swept away in the unbounded logic that such State statutes controlling wages "relate to" an apprenticeship plan, and are therefore preempted.

The Federal Davis-Bacon Act (40 U.S.C. §276a to §276a-5) rules regarding the payment of prevailing wages on Federal public works projects restrict the discounted wage rate to apprentices registered in approved programs. 29 C.F.R. §5.5(a)(4). *Dillingham* creates a different rule for State projects by eliminating the long standing requirement that a contractor utilize apprentices registered in approved programs in order to receive the wage break and pay the apprentice at the apprentice wage specific rate. Because of this anomaly, an unscrupulous

contractor can label a journey level worker an "apprentice" on a State public works project and pay the worker the lesser rate and then move the same worker to a Federal Davis-Bacon project and be required to pay the appropriate (and higher) rate of the journey level wage. The contractor could only avoid this inconsistency by registering the worker as an apprentice in a State approved program.

An even more anomalous result will occur if, in the middle of a State or local financed public works project, the public contracting agency receives Federal monies for the project. Will this require that the previously under paid apprentice be boosted up to the journey level rate of pay mid-contract term unless that employee is enrolled in a State approved program?

## CONCLUSION

The Court should grant the Petition and review this case because the decision in *Dillingham* is bad for business, bad for the public, and bad for the workers. In this day of deregulation, it may seem odd that a group of construction contractors would welcome State regulation of apprenticeship prevailing wages. But there is a simple and logical reason for this.

Contractors plan for the present as well as the future. The *Amici* contractors are desirous of continuing a healthy, sustained and legitimate apprentice training environment. Indeed, the greatest challenge for construction companies (and indirectly the construction users) in the immediate future is to find a sufficient number of



skilled, trained journey level workers. The *Amici* contractors realize this all too well. To have any chance of creating a large enough pool of skilled construction workers, apprentice programs must include certain minimum training standards. Attracting and keeping good workers requires an "appropriate" prevailing pay rate for apprentices based upon the economic conditions in the State and locale in which they are working. It is not necessary that this appropriate prevailing pay rate be based upon union contract rates or non-union working conditions, but instead is appropriate if it is a prevailing rate. Indeed, Amicus Plumbing, Heating, Cooling Contractors of California presently maintains a State approved unorganized apprentice training program, subject to the same economic realities as the organized programs. However, maintenance of such prevailing rates on State public works projects will be severely eroded if *Dillingham* remains the law, thus eventually impeding the *Amici* Contractors' overall ability to maintain minimum training standards so as to produce a skilled labor force for their use.

Moreover, maintenance of such minimum training standards must necessarily be accomplished by the mandate of State prevailing wage laws rather than through voluntary private agreements. It would not be appropriate for employers to combine among themselves to agree upon this prevailing rate, without the anti-trust protections of a union contract, because this would violate the anti-trust laws. However, it is permissible for a State, acting as a regulator, to survey and determine the appropriate apprentice specific prevailing rate payable on State public works projects. California Labor Code §1777.5.

The *Amici* contractors have for years expended substantial sums of money to fund apprentice training programs. This has been economically possible because they could pay the State developed lower prevailing pay rates for their apprentices. This funded training and pay have encouraged apprentices to continue working in the industry and working towards the journey level skill and pay. In exchange for this substantial funding and participation in approved programs which establish minimum standards to insure the health of the apprentice training environment, the employers who expend such monies have been entitled to pay the lower rate to apprentices enrolled in these programs. The economics of this practice, which have provided business, the public and workers a healthy environment and sustained apprenticeship training growth for over 35 years before ERISA, has now been knocked upside down by the *Dillingham* preemption decision. It should be reviewed and evaluated by comparing the Congressional intent behind ERISA, and the Congressional intent behind the Fitzgerald Act, both of which cry out for a result other than the one delivered by the *Dillingham* Court.

Dated: January 19, 1996

Respectfully Submitted,

WYLIE, MCBRIDE, JESINGER, SURE & PLATTEN

ROBERT E. JESINGER